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Nos. 01-653 and 01-657

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

*v.*

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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## REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

Respondents do not deny breaching the payment condition of their licenses—the condition most critical to their selection over competing applicants to use scarce spectrum in the public interest. Nor do they dispute that they failed to employ the spectrum for any purpose or to provide service to a single customer for the past five years. And they do not seriously contest the FCC's determination that allowing respondents to retain the licenses, as opposed to re-auctioning them, would injure the public interest and hinder Congress's goal of awarding licenses to those who value spectrum most highly and will put it to the most rapid and intensive use.

Instead, respondents seek to vindicate their own private financial interest by arguing that Section 525 of the Bankruptcy Code allowed them to retain the licenses for years without paying for them, prohibited the FCC from conditioning licenses on timely payment, and barred the FCC from exercising its regulatory authority to cancel the licenses. But Section 525 does not prohibit agencies from *ever* canceling a debtor's licenses. Nor does it grant respondents a right to retain the licenses without paying for them. Instead, Section 525 prohibits agencies from "revok[ing]" licenses "*solely because*" the debtor "has not paid *a debt that is dischargeable*" under the Bankruptcy Code. 11 U.S.C. 525 (emphases added).

To resolve this case, the Court need only interpret Section 525 in accordance with its carefully limited scope. The spectrum licenses here were not revoked "solely because" of financial default. Instead, the FCC's *reason for* canceling the licenses was regulatory, *i.e.*, based on an assessment of the public interest. The FCC, moreover, gave respondents the opportunity to show that the public interest favored allowing them to hold the licenses despite their inability to meet the payment conditions. The FCC thus canceled the licenses not "solely because" respondents failed to pay, but because of that fact *in combination with* respondents' failure

to show that their continued control of the spectrum would promote the public interest. Nor were the licenses canceled because respondents failed to pay a debt "that is dischargeable" in bankruptcy. The full and timely payment condition is a critical regulatory term of FCC licenses. It is not a debt, let alone dischargeable in bankruptcy.

Respondents' contrary construction of Section 525 is at odds with the Bankruptcy Code's structure and the FCC's regulatory authority. The Bankruptcy Code generally avoids intrusion on agency regulatory activities, Gov't Br. 43-47, and 47 U.S.C. 309(j)(3)(A) requires prompt utilization of spectrum "without administrative or judicial delays." Respondents nonetheless argue that Section 525 gave them additional "breathing space" to fulfill regulatory obligations, despite the FCC's determination that further extensions (beyond the one-year hiatus the FCC granted) would harm the public interest. Respondents thus construe Section 525 to impose precisely the extended judicial delays (here, 5 years and counting) that Section 309(j)(3)(A) seeks to avoid. Respondents' construction also strikes at the heart of the auction mechanism, under which the promise to pay is the central consideration in selecting one applicant over all others. As the Second Circuit recognized, the failure to fulfill that promise fatally undermines the licensee's claim that it is the entity best qualified to have exclusive use of limited spectrum resources, and that it is able to put the spectrum to immediate use. Pet. App. 109a, 229a-230a, 235a-236a; Gov't Br. 22-25. Respondents and their amici nowhere explain how the auction system can be reconciled with a regime in which a winning bidder can have its bid altered in bankruptcy, or hoard FCC licenses indefinitely in the hope that the market will eventually support its bid.

### A. The Licenses Did Not Cancel Solely Because Of Financial Default

Section 525 does not proscribe license cancellations whenever nonpayment is a "but for" cause of license revocation. See Gov't Br. 36-37; Gov't Pet. 24; Arctic Slope Br. 25. Instead, Section 525 bars license revocation only if it occurs



"solely because" of nonpayment, *i.e.*, where nonpayment is the "'one and only' or 'sole'" motive for revocation, to the *exclusion* of "any other" contributing consideration. *Jones* v. *Dunkirk Radiator Corp.*, 21 F.3d 18, 23 (2d Cir. 1994); *Farley* v. *Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (similar).

1. Here, the licenses did not cancel "solely because" respondents failed to pay a dischargeable debt. First, as the Second Circuit explained, cancellation was supported by the FCC's determination that respondents were "not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a. The FCC thus acted for a valid regulatory reason —one that applies whether or not the licensee is in bankruptcy. Contrary to respondents' claim (Br. 25-26), the FCC's "motive" *is* relevant; the phrase "solely because" in Section 525 (an anti-discrimination provision) is most naturally understood as referring to the motive for the agency's action. See Gov't Br. 38-39. The provision's "philosophy" is "to prevent discrimination against a person solely—and I emphasize the word 'solely'—because that person has undergone bankruptcy." 123 Cong. Rec. 35,671 (1977) (Rep. Foley).

Rather than show cancellation "solely because" of financial default, respondents attempt to rewrite Section 525 by excising the word "solely." Revocation was invalid, they repeatedly argue, because nonpayment was (like certain other breaches) a "trigger" for cancellation. Resp. Br. 24, 25, 26, 27 n.16. That shows only but-for causation, "a very weak sense of causation," that is "poles apart from 'sole cause,' as innumerable cases * * * make clear." *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (the words "'because of' do not mean '*solely* because of'"); *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17, 23 (1st Cir. 1989).

2. Respondents are also incorrect to claim (Br. 27) that nonpayment was the "sole" cause of cancellation. After respondents indicated that they would be unable to make timely payments as their licenses required, the FCC exam-

ined the specific financial difficulties encountered by respondents and other licensees at their request and issued three *Restructuring Orders* providing relief. See Gov't Br. 7-8, 38-39. In so doing, the FCC *suspended payment obligations* for more than a year. 13 FCC Rcd at 8354 (¶ 24). The FCC considered further delays, but determined that they would harm the public interest. Such delays would undermine auction integrity, impugn the reliability of auction results, and be unfair to unsuccessful bidders who might have bid more if the option of deferral had been announced in advance. 12 FCC Rcd at 16,446-16,447 (¶ 18). Additional "deferral of the C block debt," the FCC also explained, would interfere with "rapid," "efficient and intensive" use of the electromagnetic spectrum, see 47 U.S.C. 309(j), since it remained unclear whether "the long term financial outlook facing many licensees would" ever sufficiently "improve[]" to permit them to use the spectrum to public benefit. 12 FCC Rcd at 16,446-16,447 (¶ 18); 13 FCC Rcd at 8348, 8354 (¶¶ 7, 24). To assist C-Block licensees, the FCC offered several forms of immediate relief, including a program under which they could return individual licenses (or portions thereof) without financial penalty. See 13 FCC Rcd at 8350 (¶¶ 11-15). Manifestly, therefore, license cancellation did not occur "solely because" respondents failed to pay. It occurred in part for that reason. But it also occurred because the FCC, after considering respondents' circumstances, concluded that further relaxation of the regulatory conditions of full and timely payment would injure the public interest.[1]

As amicus Airdigm acknowledges (Br. 28-29), the FCC also has "discretion to waive any of its rules" if it determines that "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant

[1] Given the FCC's provision of relief and one-year deferral of payment obligations, respondents clearly err (Br. 27 n.16) in asserting that the FCC's *Restructuring Orders* "merely set forth formally the FCC's motives and purpose for selecting nonpayment" as a basis for license cancellation. The FCC considered further changing the payment condition, but concluded that doing so would harm the public interest.



case, and that a grant of the requested waiver would be in the public interest," particularly "[i]n view of unique or unusual factual circumstances." 47 C.F.R. 1.925(b)(3). See generally *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).[2] Several licensees sought waivers, and some are pending before the FCC. Despite the FCC's warning that bankruptcy would not by itself excuse compliance, see p. 19, *infra*, respondents did not seek such administrative relief. Instead, respondents sought to exempt themselves from FCC rules through bankruptcy—first by obtaining a bankruptcy court order reducing their payment from the $4.7 billion they bid to just over $1 billion, and then by offering to pay in full years later, only after that initial strategy had failed and market factors had changed, such that the licenses were worth $10 billion *more* than respondents' original bid.

Respondents did seek reconsideration of the FCC's decisions, and the FCC concluded that granting a waiver "retroactively" would be "unjustified." Pet. App. 71a. The FCC concluded that "the public interest in maintaining the integrity of * * * auctions, the need to ensure that licenses are allocated to those * * * best qualified to hold them, and" the goal of speeding "competition in the marketplace outweigh NextWave's individual business interests and those of its creditors." *Id.* at 80a. Congress had directed the FCC to "promote the rapid deployment of new technologies, products and services," *id.* at 81a, and to bring them "to the public without undue delay," *id.* at 66a & n.43. Respondents were "providing no service," and had left valuable spectrum "unused" for over three-and-a-half (now five) years. *Id.* at 78a, 82a. That "failure to utilize the spectrum" had "hindered the growth of innovative and competitive telecommunications services," *id.* at 82a, and allowing

[2] The FCC is not required in waiver proceedings to re-examine fundamental regulatory conclusions reached in rulemaking proceedings; nor are waivers lightly granted. But the FCC does entertain waiver requests to address circumstances not previously anticipated if the licensee shows that, under those circumstances, application of the rule will not serve its basic purposes and will harm the public interest.

respondents to continue holding the licenses would "further harm[] the public's interest in the efficient deployment of" such services, *id.* at 83a. Thus, cancellation was a product of respondents' failure to pay, a regulatory determination that further extensions were not in the public interest, *and* a determination that respondents had not shown that a waiver would be in the public interest.[3]

Although the FCC addressed factors beyond timely payment *in the very order under review*—the FCC's *Reconsideration Order*—respondents' only answer is that no "inquiry was made into NextWave's fitness to hold the licenses." Resp. Br. 27 n.16. But *fitness* (*i.e.*, possession of minimal qualifications) is not the legal standard. No source of law limited the FCC to considering fitness, or entitled respondents to retain licenses without payment upon proving minimal qualifications. Rather, the question the FCC considered is whether enforcing the timely payment conditions would serve the *public interest* those conditions were designed to promote. 47 U.S.C. 301, 309(j)(3).

This case is thus wholly unlike *Perez* v. *Campbell*, 402 U.S. 637 (1971), the decision Section 525 codifies. The statute there provided no mechanism by which a driver could prove that the public interest would be served by allowing him to retain his license despite financial default. *Id.* at 646-647. The statute instead had its "sole emphasis" on "providing leverage for the collection of damages from drivers" involved in accidents, *id.* at 646-647, and "protect[ing] judgment creditors from 'financially irresponsible persons.'" *Id.* at 649. The FCC's rules, in contrast, are designed to promote the public interest in rapid, effective and efficient deployment of scarce radio spectrum among competing applicants, not judgment collection. For that reason, the FCC

[3] Respondents imply (Br. 24 n.13) that bankruptcy law precluded them from making payments. Respondents never sought a waiver from the FCC on such grounds, and never sought bankruptcy court authority to make the payments. Besides, other licensees *have obtained* authorization to make payments in bankruptcy. See, *e.g.*, *In re Wireless Telecomm., Inc.*, No. 1-00-02188 (Bankr. M.D. Pa. Jan. 18, 2001). See also Gov't Br. 26.



procedures provided respondents with an opportunity to show that they should hold the licenses (and allowed them to hold the licenses for a year) notwithstanding their inability to make payments, an opportunity that would be wholly out of place in a regime directed primarily toward debt collection.[4]

Ultimately, respondents are deliberately vague about how Section 525 works (or how the FCC should respond) where a licensee is unable to pay for the license. Instead, they rely on the happenstance that, in this case, the market value of the licenses skyrocketed during protracted bankruptcy proceedings. Respondents thus largely ignore the fact that, for years, they disclaimed willingness ever to pay the bid as required by the licenses and that, but for a change in market conditions, they would still be unwilling to pay. Respondents cannot articulate how Section 525 can apply without fundamentally interfering with the FCC's authority. To the extent respondents offer any theory, they imply that the FCC should have instituted a *de novo* public interest inquiry into whether respondents should retain the licenses (precisely the sort of unworkable and inefficient process Congress sought to eliminate by establishing auctions, Gov't Br. 2-3), perhaps with a thumb on the scale in favor of the bankrupt. But Section 525 prohibits agencies from canceling licenses "solely because" of financial default. It does not require agencies to conduct *de novo* hearings or presume that, despite the breach of the most critical license condition, respondents remain entitled to licenses. At most, the FCC

[4] Respondents err in asserting (Br. 26) that the FCC's construction "would empty" Section 525 "of meaning," because "[t]he government can always articulate some regulatory motive for automatic cancellation." As demonstrated above, the procedures made available by the FCC would be wholly foreign to a regime motivated solely by pecuniary, rather than regulatory, concerns. Those procedures both take the FCC's rules out of Section 525's prohibition on cancellations "solely because" of nonpayment and distinguish other schemes motivated solely by pecuniary goals. Moreover, federal courts have no difficulty distinguishing regulatory from nonregulatory purposes in other bankruptcy contexts. See Arctic Slope Br. 26-27; Gov't Br. 44; Pet. App. 119a, 125a-126a.

was obligated to allow for the possibility that, for unforeseen reasons, enforcing the license condition would not serve its underlying purpose and the public interest in a particular case. The FCC did allow for that possibility, and therefore the licenses did not cancel "solely because" of default.[5]

### B. FCC License Conditions Are Not Debts That Are Dischargeable In Bankruptcy

The condition in FCC licenses requiring timely payment is not a debt, let alone one dischargeable in bankruptcy. As respondents acknowledge, a debt under the Bankruptcy Code is a claim for payment or an enforceable obligation to pay. But the licenses, as opposed to the underlying notes, do not provide the FCC with a right to compel payment. The FCC can no more force timely payment than it can force a licensee to build out its network. In either case, the FCC can make the licensee choose between compliance and continued enjoyment of the license, but it cannot force the licensee to pay. Respondents argue (Br. 20) that the underlying notes involve an enforceable obligation to pay, like other debts. But respondents cannot change the fundamental character of the license conditions by changing the subject. The status of the underlying *notes* does not make the *license condition* an enforceable obligation.[6]

Respondents likewise claim (Br. 21) that all pre-bankruptcy obligations not listed as exempt from discharge—

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[5] Even if respondents were correct that Section 525 required the FCC to rewrite its rules to replace rulemakings and waivers with *de novo* public interest review, the proper remedy would not have been for the D.C. Circuit to *award* the licenses to respondents. It would be to remand to the FCC for the sort of proceeding that Section 525 purportedly requires. Accordingly, respondents' *own* theory of Section 525, at best, entitles them to vacatur of the decision below.

[6] Respondents err in claiming (Br. 20) that the "source" of the regulatory payment condition is not the licenses or the FCC's regulations, but the "Installment Payment Plan Note." The licenses and the regulations do incorporate the terms of the Note by reference. But that merely prevents the FCC from having to repeat the precise terms and conditions in each document. Moreover, the payment condition is inherent in the use of auctions to allocate licenses.



including license conditions—are dischargeable under 11 U.S.C. 1141(d)(1)(A). This again fails to distinguish between regulatory conditions, which bankruptcy courts cannot alter or discharge, and independent payment obligations or mere debts. As the Second Circuit held, bankruptcy courts cannot alter the regulatory terms of FCC licenses, including the full and timely payment condition, while the licensee retains the license. Pet. App. 232a-235a.[7] Bankruptcy courts are limited to adjusting any "financial claims" between the FCC and licensees once the FCC has exercised its regulatory power to reclaim licenses. *Id.* at 236a-237a & n.11. Hence, regulatory conditions, including the timely payment obligations, are not dischargeable in bankruptcy and, as common sense suggests, nothing in Section 525 entitles a licensee to continue enjoying a license without paying for it.

Respondents abandon the D.C. Circuit's contrary analysis of dischargeability, including that court's (clearly incorrect) assertion that Section 525 empowered *it* to discharge license conditions in bankruptcy. See Gov't Br. 31-32. Instead, respondents assert (Br. 31) that a *bankruptcy court* can discharge license conditions but cannot prevent an agency from "react[ing]" to the change "by canceling the licenses." Respondents avoid spelling out this approach because of its fatal contradictions. On the one hand, if a bankruptcy court cannot modify license conditions, then the payment condition is *not* dischargeable in bankruptcy, much less dischargeable while respondents continue to hold the license. Instead, the FCC retains regulatory authority to cancel the licenses in the public interest, as it did here. On the other hand, if a

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[7] Respondents incorrectly state (Br. 30) that the Second Circuit found "'no occasion to express an opinion' whether [the] Bankruptcy Code precludes revocation." In fact, the Second Circuit expressed no view on "the merits of" the "*bankruptcy court['s] * * * arguments* against revocation," which were that "granting the [l]icenses at a small fraction of NextWave's original successful bid best effectuated the [Federal Communications Act's] goals," and that the FCC's actions were arbitrary and capricious. Pet. App. 126a-127a (emphasis added). Those *Communications Act* arguments, the court held, should be addressed to the D.C. Circuit under the Communications Act, 47 U.S.C. 402, and the Hobbs Act, 28 U.S.C. 2341.

bankruptcy court can modify the *license condition* (as opposed to any underlying debt), it also can eliminate the FCC's legal right to cancel a license, which is premised on a violation of the license condition. If the license condition is truly subject to modification and discharge, the bankruptcy court can rewrite the license, as the bankruptcy court purported to do here, to declare that "for a price of $1.023 billion NextWave [sh]ould retain licenses for which it had bid $4.74 billion." The Second Circuit wisely rejected that approach because it "impair[s] the FCC's method for selecting licensees" and "effectively award[s] the [l]icenses to an entity that the FCC determined was not entitled to them." Pet. App. 235a. More broadly, the prospect of bankruptcy courts determining the *true* value of government licenses (and the *best licensee* to hold them) is an untenable but inevitable result of respondents' theory.[8]

Respondents' theory also creates an inappropriate conflict between Section 525 and the Communications Act. The Communications Act vests exclusive authority to issue licenses in the FCC and declares that no license "shall be construed to create any right, beyond the terms, conditions and periods of the license." 47 U.S.C. 301. Section 309(j) specifies that the FCC must use auctions and provides that "[n]othing * * * in the use of competitive bidding" shall "diminish the authority of the Commission under the other provisions of this [Act] to regulate or reclaim spectrum licenses." 47 U.S.C. 309(j)(6)(C). Yet respondents would accord bankruptcy courts authority to modify license conditions the FCC has imposed and expressly declined to modify

[8] This anomaly does not arise in the standard application of Section 525. If a regulator purports to revoke a non-exclusive license (*e.g.*, a drivers' license) because the licensee entered bankruptcy, Section 525 precludes revocation and the license is not revoked. But if a license is revoked for failure to meet a license condition of timely payment, restoration of the license begs the question whether the licensee must continue to make payments and in what amount and on what schedule. Section 525 provides no guidance on those questions, because it was never intended to excuse compliance with regulatory conditions or to entitle a bankrupt to enjoy an exclusive government license without paying for it.



on regulatory grounds; and they would convert the use of auctions into a reason for "diminish[ing] the authority of the FCC" to reclaim licenses upon breach of regulatory conditions. And, while Section 309(j)(3)(A) directs that licenses be issued and spectrum utilized without undue "administrative or judicial delay," respondents propose a construction of Section 525 that would routinely produce sizeable judicial delays. Finally, by construing Section 525 to allow them to retain their licenses despite violating universally applicable regulatory requirements and despite FCC public interest determinations, respondents would convert Section 525 from a prohibition on discrimination *against* debtors into a requirement of discrimination *in their favor*. See Gov't Br. 33-35; *Duffey* v. *Dollison*, 734 F.2d 265, 273 (6th Cir. 1984) (Section 525 "not * * * intended by Congress to afford debtors * * * preferential treatment").

Respondents claim (Br. 32-33) that the regulatory payment condition is "dischargeable" because, if the licenses were returned, the remaining debt could be discharged. Again respondents fail to distinguish between regulatory license conditions and ordinary debts. The regulatory payment *condition of the licenses* does not become "dischargeable" when the licenses are returned. Instead, *it ceases to exist*, because it persists only so long as the licensee retains the licenses. A similar error infects respondents' metaphysical assertion (Br. 33) that the license payment condition "is discharged when a reorganization plan provides for full payment of a claim according to the original terms of the obligation." That argument assumes its conclusion—that the payment *condition* in the license (as opposed to the payment *obligation* that exists independent of the license) is actually "discharged" and replaced by the bankruptcy court with a "new" identical condition, rather than passing through unaltered. Cf. *In re National Gypsum Co.*, 208 F.3d 498, 504 n.4 (5th Cir.) (executory contract neither assumed nor rejected "will 'ride through' the proceedings"), cert. denied, 531 U.S. 871 (2000); *Federal's, Inc.* v. *Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th Cir. 1977) (same); V. Countryman,

*Executory Contracts in Bankruptcy*, 58 Minn. L. Rev. 479, 561-562 (1974) (non-action "means nondischargeability").

The Bankruptcy Code's treatment of executory contracts confirms by analogy that the payment conditions are not dischargeable, since a debtor's obligations under executory contracts cannot be eliminated while the debtor seeks to retain the benefits thereof. See Gov't Br. 32-35.[9] Respondents have conceded that, if a debtor "assumes" an executory contract, its payment obligations are treated as a post-petition debt that "would not be dischargeable." Br. in Opp.

[9] Contrary to respondents' claims (Br. 21-24), neither *Ohio* v. *Kovacs*, 469 U.S. 274 (1985), nor *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552 (1990), resolves the dischargeability issue. Neither of the obligations at issue in those cases was executory, such that the obligations were not "debts" while the agreements remained in force. See Gov't Br. 35 n.11. In fact, *Kovacs* supports the government's view. In that case, the State had entered an order requiring the debtor to clean up contaminated property. Although the Court did not question the State's authority to regulate the conditions under which the debtor could keep the property, the State in that case had divested the debtor of the property, an act that "converted" the clean-up order "into an obligation to pay money" divorced from regulation of the property itself. 469 U.S. at 283. The Court held that such a naked payment order is a "debt," but it did "not question that *anyone in possession* of the [polluted] site" must "comply with the environmental laws of the State of Ohio." *Id.* at 274, 285. Similarly here, a naked FCC order to pay money *after* the FCC recovers the licenses may be dischargeable. But anyone *in possession* of FCC licenses must "comply with the" regulatory conditions of the licenses. *Davenport* does not purport to overrule *Kovacs*. There, the Court held that a restitution order, imposed as a condition of probation, was a "debt." But it did not reach whether the debt could be discharged *while* the probationer claimed a right to remain on probation. The bankruptcy court opinion in that case, which this Court upheld, stated that probation revocation was a "complex question" which was "not present" in the case. *In re Davenport*, 83 B.R. 309, 316 n.7 (Bankr. E.D. Pa. 1988). See *Bryan* v. *Rainwater*, 254 B.R. 273 (Bankr. N.D. Ala. 2000) (bankruptcy court cannot preclude revocation of probation); *In re Gilliam*, 67 B.R. 83 (Bankr. M.D. Tenn. 1986) (similar). Here, in contrast, the FCC is seeking to cancel the licenses. The restitution order at issue in *Davenport*, moreover, was wholly unlike the payment condition at issue here, which is not merely a condition of licensure, but also the *primary* reason the licensee was selected (to the exclusion of others) to hold the license to serve the public interest.



18 & n.8; *National Gypsum*, 208 F.3d at 507. If the debtor neither assumes nor rejects an executory contract, the payment conditions likewise "ride through" bankruptcy, such that "nonaction means nondischargeability." *Id.* at 504 n.4; Countryman, *supra*, at 561-562. Finally, if the debtor *rejects* the license and returns it, the payment condition of the license expires of its own accord and again is not subject to discharge. See p. 11, *supra*. Consequently, if the FCC licenses were treated as executory obligations—and respondents nowhere deny that they are executory—the payment conditions would not be "dischargeable," much less dischargeable while respondents insist on retaining them. Respondents offer no reason why the *regulatory* payment conditions of their licenses should be more readily subject to discharge than the payment conditions in ordinary commercial licenses. Gov't Br. 34-35 & n.11; Arctic Slope Br. 31 & n.8.[10]

### C. Respondents' Construction Is Contrary To Federalism Principles And Conflicts With The Code's Structure

1. Respondents' construction would also convert Section 525 into an inappropriate barrier to legitimate regulatory policies. It is one thing for bankruptcy law to bar a State, for example, from frustrating the purpose of federal bankruptcy law by canceling a license "solely because" of nonpayment of a previously discharged debt where the State's purpose is to promote public or private financial interests. That was the teaching of *Perez* v. *Campbell*, *supra*. But it is quite another thing to read federal bankruptcy law to allow bankruptcy courts to second-guess the value of state licenses, and to

[10] Respondents also have no right to "assume" the licenses, even if they are treated as mere executory contracts. See 3 *Collier on Bankruptcy* ¶ 365.06[1][d] & n.13 (2002) (debtor cannot assume contract over objection if counterparty has right to object to assignment and changes in control); 47 U.S.C. 310(d); 41 U.S.C. 15. And while respondents assert (Br. 35 n.23) that the issue was "waived," respondents raised the executory contract analogy themselves in their brief in opposition (at 17-18 & n.8). They simply shrink from the legal consequences of their own argument. Moreover, a litigant does not "waive" an apt analogy supporting its fundamental submission by not employing it below. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

allow bankrupts to continue enjoying such licenses without paying for them, or to override regulatory decisions.

Indeed, respondents cite *no* case in which a federal court has invalidated an agency's exercise of its regulatory authority, where, as here, the agency's actions are driven by *regulatory* concerns; the payment conditions are intimately connected to the issuance of the license and the integrity of the allocation process; the agency affords licensees the opportunity to address whether enforcement would serve the rule's underlying purpose and the public interest; and the agency, after examining the circumstances confronting the licensee and providing an exception for a period of time, has determined that enforcement is necessary to achieve "appropriate regulatory policies," H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977). Nor do respondents show that Congress clearly intended such a grave intrusion on federal and state regulatory authority. Cf. *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232-2234 (2002) ("historic police powers" not superseded absent "clear and manifest purpose"). Congress, in fact, disavowed any such intent. "[I]t was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives." 123 Cong. Rec. at 35,673. By reading the word "solely" out of Section 525, and expanding the phrase "debt that is dischargeable" beyond its ordinary scope, respondents create precisely the intrusion on regulatory authority Congress disclaimed.[11]

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[11] Respondents' reliance (Br. 25-26) on Section 525's exemption for certain agricultural programs is misplaced. Those exemptions clarify that there can be no effect on the Secretary of Agriculture's authority *even if* the Secretary revokes a license solely because of financial default. Furthermore, when those exemptions were proposed as a floor amendment, Section 525's sponsor found it "difficult to understand" their necessity or how "section 525 might be interpreted to prevent * * * necessary regulatory actions," since it "applies only where the discrimination is practiced 'solely'" on the basis of "whether a person is, or has been a bankrupt." 123 Cong. Rec. at 35,673. The amendment was nonetheless accepted as a potentially redundant "clarification." *Ibid.* Cf. *Chevron U.S.A., Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2049-2050 (2002); *United States* v. *Vonn*, 122 S. Ct. 1043, 1049-1050 (2002). Finally, those exemptions involve government efforts to take into account past financial performance, including payments of debts, and do not involve agency efforts to insist on payment of the fee for the very license at issue, let alone to enforce regulatory conditions that are neither debts nor dischargeable in bankruptcy, where the regulator may consider other factors affecting the public interest.



2. Nothing in *Section 525's* text, title, history, or structure, supports respondents' newly minted claim that Section 525 was designed to "give the debtor-in-possession some flexibility and breathing space" (Resp. Br. 34) against a regulator's authority to protect the public interest, much less *additional* breathing space after the regulator granted a year of relief but declined to grant more based on its assessment of the public interest. First, it should be emphasized that respondents are able to rely on their more modest claim to "breathing space," rather than the broader power their theory implies—the power to rewrite federal and state regulatory licenses—only because of the happenstance that market circumstances so changed during bankruptcy that they can now offer full payment. That is far from typical in the bankruptcy context, and respondents must embrace the full consequences of their theory. Second, even respondents' effort to use Section 525 to obtain "breathing space" is misplaced. The Code provision designed to provide debtors with "breathing space"—the *automatic stay*—exempts exercises of "regulatory power," such as the FCC's, from its scope. See 11 U.S.C. 362(b)(4); Pet. App. 125a-127a; Gov't Br. 44.[12] By its terms, Section 525 categorically bars certain

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[12] Nor is there force in respondents' reliance (Br. 19 n.12; see Creditors' Br. 8-9) on the fact that the FCC suggested legislation to clarify that its licensing decisions are unaffected by Section 525. The FCC's consistent position has been that such legislation would *clarify* the law, not alter it. App. C, *infra*, 8a. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (failure to enact change may signal Congress's view "that the existing legislation already incorporated the offered change"); App. D, *infra*, 14a-15a. Drawing inferences from legislative inaction would be particularly unwarranted here, given that the proposed clarification *was passed by the Senate*, 145 Cong. Rec. S9419, S9434 (July 27, 1999), but was stricken from the House bill by a

discriminatory acts in perpetuity; it does not purport to regulate the timing of legitimate regulatory actions. In addition, respondents' "breathing space" theory conflicts with the Communications Act, which directs the FCC to ensure "rapid deployment of new technologies, products and services" and "efficient and intensive use of the electromagnetic spectrum" *without* "administrative or judicial delays," 47 U.S.C. 309(j)(3)(A), (C) and (D). Respondents read Section 525 as imposing the very delays—during which debtors may warehouse spectrum licenses while deciding whether and how to pay for them—the Communications Act seeks to avoid.[13]

3. Respondents' reading of Section 525 is incompatible with the auction process. Indeed, their construction would threaten to preclude the FCC from denying a license to a bidder in response to its failure to make good on its bid *before* the license is issued, because Section 525 also states that a governmental agency may not "deny" a license "solely because" of a dischargeable financial default. 11 U.S.C. 525(a). See Gov't Br. 49; Arctic Slope Br. 42-44.

Here, respondents were among "a handful of large bidders" that "bid extremely high prices" per population unit—much more than the majority of successful C-block bidders. 12 FCC Rcd at 16,442 (¶ 10). Although respondents *now* purport to be willing to pay in full, for years the spectrum

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single member *without vote*, see 145 Cong. Rec. H12741-H12742 (Nov. 18, 1999). Far more significant is Congress's "failure to revise or repeal the agency's interpretation" when expanding the FCC's auction authority in 1997, which "is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). Indeed, Congress concluded that the FCC's auction regime had "proven to be consistent with the Committee's long-term goals for telecommunications policy." H.R. Rep. No. 149, 105th Cong. 1st Sess. 558 (1997).

[13] Respondents' claimed "right to cure" its defaults (Br. 35, 40)—a matter not addressed below and not within the scope of the question presented—rests on a misconstruction of 11 U.S.C. 1123(a)(5)(G) and 1124(2)(A). Neither of those provisions creates a *right* to cure *regulatory* defaults or to force a regulator to award a license where it does not serve the public interest, and any cure rights necessarily terminated when the licenses canceled. Cf. *In re DeSeno*, 17 F.3d 642, 644 (3d Cir. 1994).



lay fallow as respondents failed to make even their first installment payment, disclaimed willingness *ever* to pay the bid amount, and labeled their agreement to pay so unreasonable as to be "constructively fraudulent." Only after the Second Circuit rejected their effort to reduce the payment condition by 80 percent, and only after the licenses *increased in value* dramatically, did respondents become willing to pay in full. A system of auctions that is designed to identify the bidder that values the spectrum most highly and place spectrum rapidly into public service cannot function if winning bidders can warehouse licenses—leaving spectrum unused and the public unserved—while they tergiversate on whether to meet license conditions in light of changing market conditions and litigation fortunes. Congress directed the FCC to establish auctions, not issue options contracts. Although respondents dispute the rationality of such a bidding strategy, this case proves otherwise, and underscores the FCC's regulatory concerns. After outbidding other applicants by agreeing to pay $4.7 billion for the licenses and trying to keep them for just over $1 billion, respondents now claim an unrestricted right to retain the licenses for the original bid price of $4.7 billion because the value of the licenses rose to as much as $16 billion during protracted bankruptcy proceedings. That is a profitable option for a "thinly capitalized" company that made only limited downpayments and has never offered service to the public. If this Court were to bless that heads-I-win-tails-you-lose scenario, it is hard to see why others would not seek to replicate respondents' maneuvers.

Respondents suggest that, absent their construction, government creditors might "plunder the estate" by "taking advantage of creditor protections under the Code when the value is low" and seizing "collateral when the value is high." Resp. Br. 23, 50. By its terms, however, Section 525 does not address that issue, because it does not address the *time* during which government agencies may withdraw licenses; it merely bars them from withdrawing licenses "solely because" the debtor failed to pay a debt "that is dischargeable."

To the extent regulators seek to promote financial rather than regulatory interests, such concerns are addressed by the automatic stay, 11 U.S.C. 362, which permits agency action to proceed despite bankruptcy only if it is *regulatory* in nature. Gov't Br. 43-44. The FCC, moreover, does not pursue financial returns over the public interest. Cf. 47 U.S.C. 309(j)(7)(B). "[I]mportant communications policy objectives" are not to be "sacrificed in the interest of maximizing revenues." H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993). The FCC "is not a collection agency." *Ibid.*

The suggestion that the FCC changed its position along with market conditions (Urban Comm. Br. 22) is baseless. The FCC's *Restructuring Orders*, for example, allowed respondents and others to return licenses and avoid payment without financial penalty at a time when, by respondents' own account (Br. 5 n.2), license values were depressed. Indeed, the FCC ended up re-auctioning each of those returned licenses at a loss in Auction 22. See App. A, *infra*, 1a-6a. Where the Commission recovered licenses after default, it again re-auctioned almost every license at a loss. See App. B, *infra*, 7a. Even when respondents insisted that the licenses at issue here were worth only one-quarter of respondents' original bid—and that the FCC would be financially better off accepting their reduced offer than re-auctioning the licenses—the FCC insisted that the bankruptcy court should return the licenses to it. C.A. App. 589.

> Court: So, the FCC might get more money for the American public under a new license or it might get less?
>
> [Gov't]: Money is not the end goal. * * *
>
> Court: Money is not the objective.
>
> [Gov't]: No. * * * Congress told us what the objective was. * * * A fair and efficient allocation of the limited resource of radio spectrum.
>
> Court: All right, I hear the words. They have no content for me.

*Id.* at 590-591. See note 14, *infra*.



The claim that the FCC misled respondents' creditors is also without merit. The FCC has consistently insisted that payment conditions "remain fully enforceable by the FCC even though NextWave is in bankruptcy." C.A. App. 553. In September of 1997, well before respondents filed for bankruptcy, the FCC Commissioners advised members of Congress that they disagreed with the argument of many C-block licensees "that, even if they default on their installment payments, the Commission cannot take back and reauction spectrum licenses while bankruptcy litigation is ongoing. *We believe this is an incorrect reading of the statutory scheme and that we ultimately will prevail in court.*" If license conditions are not "met, the licenses automatically revert to the FCC." App. C, *infra*, 8a-9a. When respondents first filed for bankruptcy and told the FCC that, in their view, bankruptcy excused them from complying, the FCC replied that bankruptcy "did not relieve" them of their "regulatory obligations." Pet. App. 69a. And when the bankruptcy court held its hearing on remedies—while respondents were arguing that the licenses were worth only one quarter of what they had bid, and *before* the creditors committed additional money to fund full payment—the FCC repeatedly told the court that, "first and foremost, the FCC wants the license back." C.A. App. 563-564. Respondents' bankruptcy counsel had no difficulty understanding the FCC's position as "we want the licenses." *Id.* at 597.[14]

Respondents and their amici nonetheless fault the FCC for not *announcing* the re-auction until January 2000. The timing of the Commission's Public Notice is hardly surprising. The bankruptcy court denied the FCC's motion to lift

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[14] C.A. App. 565 ("[F]irst and foremost, * * * the licenses must come back as a matter of regulatory law."); *id.* at 568 ("That the licenses should cancel. That they should revert to the FCC."); *id.* at 573 ("The Court: Okay. So, you want to take back the licenses. Mr. Alter: That's right."); *id.* at 581 ("The foremost concern of the FCC as regulator, is to receive the licenses back."); *id.* at 589 ("Our paramount request is that the licenses return to the FCC."); *id.* at 590 ("[O]f paramount importance, is receiving the licenses back so the FCC can fulfill its public charge with regard to the limited and very precious resource of spectrum.").

the automatic stay to recover its licenses, see Pet. App. 293a, and the Second Circuit did not reverse until December 1999, *id.* at 213a. As the Second Circuit recognized, it was "[b]ecause of the ongoing litigation" that the FCC had "not yet sought to take any action vis-à-vis the [l]icenses." *Id.* at 245a n.15. And the Second Circuit recognized that its decision opened the door to FCC action, noting that "it would probably be fair to assume that the FCC will seek to revoke the [l]icenses." *Ibid.*

* * * * *

Respondents' effort to use Section 525 to defeat the FCC's regulatory efforts is not supported by Section 525's text, purpose or history. To the contrary, by reading the word "solely" out of Section 525, and treating regulatory license conditions as "dischargeable debts," respondents and the decision below would inappropriately convert Section 525 into a barrier to the achievement of regulatory goals—a result Congress specifically disclaimed—and place that provision in conflict with the system of auctions Congress established through Section 309(j). Accordingly, for the foregoing reasons and those stated in our brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Federal Communications Commission*

* The Solicitor General is disqualified in this case.

**APPENDIX A**

**30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| Aberdeen, SD | $411,666 | $93,000 |
| Ada, OK | $783,000 | $0 |
| Alpena, MI | $475,500 | $156,400 |
| Amarillo, TX | $7,252,500 | $3,567,000 |
| Anchorage, AK | $4,922,250 | $873,750 |
| Anderson, IN | $2,083,712 | $78,140 |
| Ardmore, OK | $1,653,750 | $62,016 |
| Athens, OH | $1,356,825 | $50,882 |
| Augusta, GA | $13,067,250 | $1,317,750 |
| Bakersfield, CA | $26,941,575 | $1,875,950 |
| Baton Rouge, LA | $25,515,000 | $2,745,750 |
| Beaumont, TX | $15,083,250 | $565,622 |
| Beckley, WV | $731,258 | $413,950 |
| Bend, OR | $1,666,500 | $280,500 |
| Benton Harbor, MI | $4,206,000 | $346,800 |
| Bismark, ND | $557,275 | $0 |
| Bloomington, IL | $5,391,000 | $1,708,500 |
| Bluefield, WV | $1,458,751 | $124,950 |
| Blytheville, AR | $471,750 | $18,000 |
| Boise, ID | $7,742,325 | $632,250 |
| Brownwood, TX | $976,500 | $223,500 |
| Buffalo, NY | $34,326,011 | $3,073,600 |
| Butte, MT | $260,833 | $0 |
| Canton, OH | $8,987,250 | $381,959 |
| Cape Girardeau, MO | $2,502,750 | $93,854 |
| Carbondale, IL | $2,370,750 | $0 |
| Carlsbad, NM | $521,250 | $325,500 |
| Casper, WY | $1,531,500 | $57,431 |
| Champaign, IL | $6,065,250 | $718,500 |
| Cheyenne, WY | $3,684,750 | $0 |
| Chicago, IL | $461,009,045 | $117,873,000 |
| Columbia, MO | $3,518,250 | $494,700 |
| Columbus, GA | $5,265,000 | $953,000 |
| Corpus Christi, TX | $10,306,508 | $825,750 |
| Cumberland, MD | $2,516,250 | $125,813 |

**30 MHz LICENSES MADE AVAILABLE BY RESTRUCTURING ORDERS (cont'd)**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| Dallas, TX | $291,023,250 | $62,412,000 |
| Dalton, GA | $1,221,000 | $45,788 |
| Danville, VA | $6,534,754 | $245,054 |
| Davenport, IA | $13,889,250 | $1,639,500 |
| Daytona Beach, FL | $18,351,000 | $688,163 |
| Decatur, IL | $6,142,500 | $285,000 |
| Des Moines, IA | $19,164,750 | $3,786,750 |
| Detroit, MI | $172,738,500 | $13,177,550 |
| Dickinson, ND | $205,501 | $8,250 |
| Dubuque, IA | $5,328,000 | $1,040,250 |
| Eagle Pass, TX | $941,250 | $116,250 |
| East Liverpool, OH | $585,038 | $24,864 |
| El Dorado, AR | $846,000 | $56,250 |
| Elkhart, IN | $6,620,250 | $452,200 |
| Enid, OK | $285,750 | $0 |
| Erie, PA | $6,870,750 | $292,007 |
| Escanaba, MI | $1,257,750 | $146,200 |
| Eugene, OR | $15,066,000 | $714,750 |
| Fairbanks, AK | $562,500 | $0 |
| Fairmont, WV | $526,500 | $79,000 |
| Fayetteville, AR | $2,282,250 | $85,585 |
| Findlay, OH | $1,996,163 | $84,838 |
| Flint, MI | $8,615,250 | $685,950 |
| Ft Smith, AR | $4,660,501 | $356,250 |
| Ft Wayne, IN | $19,629,962 | $834,274 |
| Fredericksburg, VA | $6,122,254 | $229,585 |
| Fresno, CA | $47,026,575 | $3,243,000 |
| Garden City, KS | $364,500 | $42,500 |
| Great Bend, KS | $191,250 | $13,600 |
| Great Falls, MT | $640,000 | $67,500 |
| Hammond, LA | $2,466,075 | $631,500 |
| Harrisburg, PA | $17,457,761 | $1,603,100 |
| Hartford, CT | $51,321,750 | $1,924,566 |
| Hastings, NE | $930,076 | $39,528 |
| Hilo, HI | $3,611,262 | $135,423 |



**30 MHz LICENSES MADE AVAILABLE BY RESTRUCTURING ORDERS (cont'd)**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| Honolulu, HI | $53,594,250 | $2,828,250 |
| Houghton, MI | $180,375 | $51,000 |
| Huntington, WV | $4,972,500 | $729,300 |
| Huron, SD | $384,000 | $14,400 |
| Hyannis, MA | $9,000,000 | $420,750 |
| Idaho Falls, ID | $4,440,750 | $166,529 |
| Iowa City, IA | $2,564,250 | $401,250 |
| Iron Mountain, MI | $318,750 | $22,500 |
| Ironwood, MI | $198,356 | $8,250 |
| Jamestown, NY | $3,793,500 | $0 |
| Jefferson City, MO | $2,122,500 | $160,650 |
| Johnstown, PA | $2,480,000 | $0 |
| Jonesboro, AR | $1,853,250 | $76,500 |
| Juneau, AK | $622,613 | $0 |
| Kalamazoo, MI | $8,403,000 | $546,550 |
| Kankakee, IL | $912,203 | $190,500 |
| Keene, NH | $3,795,000 | $0 |
| Kirksville, MO | $287,250 | $74,800 |
| Lafayette, LA | $15,265,500 | $572,250 |
| Lancaster, PA | $13,198,416 | $686,800 |
| Laredo, TX | $6,799,583 | $322,500 |
| Las Salle, IL | $1,930,500 | $391,000 |
| Lebanon, NH | $4,451,261 | $189,179 |
| Lewiston, ID | $537,075 | $59,250 |
| Liberal, KS | $318,750 | $25,500 |
| Lihue, HI | $2,512,500 | $94,219 |
| Lima, OH | $3,426,000 | $145,605 |
| Little Rock, AR | $22,610,250 | $3,693,750 |
| Logan, UT | $276,825 | $104,250 |
| Logan, WV | $639,000 | $0 |
| Longview, TX | $4,059,000 | $152,213 |
| Lufkin, TX | $2,840,250 | $0 |
| Lynchburg, VA | $6,144,001 | $230,401 |
| McAlester, OK | $774,000 | $29,025 |

**30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| McComb, MS | $2,424,000 | $420,750 |
| Macon, GA | $11,700,076 | $968,000 |
| Mankato, MN | $4,216,500 | $441,750 |
| Mansfield, OH | $5,541,000 | $235,493 |
| Marinette, WI | $1,604,250 | $60,160 |
| Marion, OH | $1,211,250 | $0 |
| Marquette, MI | $1,252,500 | $159,800 |
| Mattoon, IL | $434,325 | $20,250 |
| Medford, OR | $4,284,750 | $310,500 |
| Michigan City, IN | $886,500 | $58,500 |
| Minot, ND | $251,666 | $0 |
| Missoula, MT | $789,000 | $29,588 |
| Mitchell, SD | $399,000 | $26,250 |
| Mt. Vernon, IL | $1,353,000 | $81,600 |
| Muncie, IN | $2,396,462 | $89,868 |
| Natchez, MS | $741,000 | $27,788 |
| Norfolk, NE | $814,500 | $34,616 |
| Olean, NY | $4,697,250 | $0 |
| Paris, TX | $2,292,750 | $0 |
| Parkersburg, WV | $1,896,000 | $240,000 |
| Peoria, IL | $13,511,250 | $2,059,500 |
| Pine Bluff, AR | $1,530,750 | $57,750 |
| Pittsfield, MA | $3,002,261 | $127,597 |
| Pocatello, ID | $1,020,000 | $72,000 |
| Poplar Bluff, MO | $1,381,500 | $57,000 |
| Portsmouth, OH | $1,253,250 | $0 |
| Pottsville, PA | $4,561,511 | $228,076 |
| Presque Isle, ME | $562,500 | $0 |
| Provo, UT | $6,678,075 | $275,250 |
| Quincy, IL | $1,531,500 | $700,500 |
| Rapid City, SD | $1,470,001 | $225,250 |
| Reno, NV | $27,802,575 | $1,651,500 |
| Rochester, MN | $4,389,000 | $239,700 |
| Rochester, NY | $27,255,011 | $2,324,750 |
| Rockford, IL | $14,433,000 | $2,509,500 |



**30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| Rolla, MO | $804,750 | $30,179 |
| Rome, GA | $1,584,000 | $59,400 |
| Roseburg, OR | $1,659,000 | $62,213 |
| St. Cloud, MN | $6,826,043 | $1,602,000 |
| St. Louis, MO | $104,425,580 | $14,611,500 |
| Salem, OR | $17,070,000 | $704,250 |
| Salina, KS | $1,200,750 | $51,032 |
| Salisbury, MD | $4,878,750 | $0 |
| Salt Lake City, UT | $82,293,825 | $3,394,500 |
| Sault Ste. Marie, MI | $929,250 | $170,000 |
| Sherman, TX | $5,995,501 | $1,274,250 |
| Shreveport, LA | $12,926,250 | $586,500 |
| Sioux Falls, SD | $5,147,345 | $239,250 |
| Springfield, IL | $7,650,750 | $615,000 |
| Springfield, MA | $22,495,511 | $1,229,100 |
| State College, PA | $2,597,261 | $129,864 |
| Steubenville, OH | $1,221,000 | $0 |
| Sunbury, PA | $4,591,511 | $229,576 |
| Texarkana, TX | $2,760,750 | $128,250 |
| Tupelo, MS | $4,520,438 | $169,517 |
| Twin Falls, ID | $2,574,000 | $96,525 |
| Tyler, TX | $9,651,000 | $361,913 |
| Valdosta, GA | $1,689,008 | $149,250 |
| Vicotria, TX | $2,301,666 | $86,313 |
| Waco, TX | $5,889,750 | $318,000 |
| Watertown, SD | $534,750 | $34,000 |
| Waycross, GA | $576,751 | $431,250 |
| West Plains, MO | $262,500 | $0 |
| Wheeling, WV | $2,025,000 | $171,000 |
| Wichita, KS | $9,632,337 | $1,455,750 |
| Wichita Falls, TX | $4,292,259 | $945,750 |
| Williamsport, PA | $2,241,761 | $112,089 |
| Williston, ND | $462,755 | $17,354 |
| York, PA | $9,045,011 | $613,700 |
| Youngstown, OH | $12,059,250 | $512,519 |

**30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)**

| Market Name | Original C Block Winning Bid | Auction 22 Winning Bid |
|---|---|---|
| Zanesville, OH | $1,401,750 | $52,566 |
| Guam | $1,073,250 | $53,663 |
| U.S. Virgin Islands | $7,797,750 | $419,050 |
| Northern Mariana Islands | $422,250 | $21,113 |
| **TOTAL** | **$2,111,873,440** | **$292,503,485** |



**APPENDIX B**

**30 MHz LICENSES REAUCTIONED BECAUSE OF LICENSEE DEFAULT**

| Market Name | **Original C Block Winning Bid** | **Auction 22 Winning Bid** |
|---|---|---|
| Ashtabula, OH | $900,000 | $38,250 |
| Bowling Green, KY | $3,783,750 | $141,891 |
| Bozeman, MT | $1,714,501 | $64,295 |
| El Centro, CA | $5,362,500 | $201,000 |
| Flagstaff, AZ | $3,506,250 | $131,485 |
| Glens Falls, NY | $1,650,000 | $61,875 |
| Grand Junction, CO | $4,879,500 | $357,000 |
| Greeley, CO | $3,840,750 | $0 |
| Hays, KS | $492,000 | $40,800 |
| Helena, MT | $1,158,000 | $0 |
| Kahului, HI | $7,752,000 | $352,500 |
| Kalispell, MT | $715,501 | $0 |
| Lawrence, KS | $2,991,000 | $112,163 |
| Madisonville, KY | $692,250 | $25,960 |
| Manahattan, KS | $2,910,000 | $109,125 |
| Nogales, AZ | $1,240,500 | $46,519 |
| Owensboro, KY | $2,468,250 | $92,560 |
| Paducah, KY | $2,417,250 | $0 |
| Phoenix, AZ | $213,807,750 | $11,188,500 |
| Plattsburgh, NY | $1,282,500 | $0 |
| Prescott, AZ | $4,575,000 | $171,563 |
| Pueblo, CO | $4,991,675 | $187,188 |
| Richmond, IN | $855,000 | $35,250 |
| Rock Springs, WY | $849,000 | $40,500 |
| Sierra Vista, AZ | $2,242,500 | $84,094 |
| Somerset, KY | $1,522,500 | $57,094 |
| **TOTAL** | **$285,440,677** | **$13,796,140** |

**APPENDIX C**

[Seal Omitted]

**FEDERAL COMMUNICATIONS COMMISSION**

**WASHINGTON**

September 17, 1997

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
B351C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde and Congressman Conyers:

We are writing to urge you to adopt legislation that would clarify that wireless licensees who default on their installment payments may not use bankruptcy litigation to refuse to relinquish their spectrum licenses for reauction. The Administration and Chairman Hundt previously sought such legislation as part of budget reconciliation. We are writing now to emphasize the importance of this legislation and the need for quick action.

A number of the FCC's Personal Communications Services (PCS) "C-Block" auction licensees have argued that, even if they default on their installment payments, the Commission cannot take back and reauction spectrum licenses while bankruptcy litigation is ongoing. We believe this is an incorrect reading of the statutory scheme and that we ultimately will prevail in court. We



specifically believe that FCC licenses are not "property" subject to the bankruptcy code. Moreover, it is our view that we have granted these PCS licenses subject to conditions, and, should those conditions not be met, the licenses automatically revert to the FCC. However, in the absence of clarifying legislation, there is a risk that valuable spectrum licenses will be tied up in litigation, delaying the return and reauction of the licenses, the introduction of new services and competition, and the collection of revenues.

We do not believe that Congress intended to allow licensees to use Chapter 11 or Chapter 7 bankruptcy litigation as a haven to horde valuable FCC licenses. We strongly urge you to adopt legislation that would clarify that provisions of the Bankruptcy Code are not applicable to any FCC license for which a payment obligation is owed, do not relieve any licensees from payment obligations, and do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses. It would greatly assist in restoring certainty to the marketplace.

Thank you for your consideration of the enclosed proposed legislation. We would be happy to answer any questions you may have.

Sincerely,

/s/ REED E. HUNDT
REED E. HUNDT
Chairman

/s/ JAMES QUELLO
JAMES QUELLO
Commissioner

/s/ SUSAN NESS
SUSAN NESS
Commissioner

/s/ RACHELLE CHONG
RACHELLE CHONG
Commissioner

Attachment

CC: The Honorable Orrin Hatch
The Honorable Patrick J. Leahy
The Honorable Charles Grassley
The Honorable Richard Durbin
The Honorable George Gekas
The Honorable Jerrold Nadler



**APPENDIX D**

[Names Omitted]

**United States Senate**

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

August 9, 2002

The Honorable John Ashcroft
Attorney General
Department of Justice
10th and Constitution Avenue, N.W.
Washington, DC 20530

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Attorney General Ashcroft and Chairman Powell:

We write to express our support for your efforts at the Supreme Court to ensure that the will of Congress is implemented with respect to the competitive bidding process Congress established to allocate the electromagnetic radio spectrum fairly and efficiently. Specifically, your position that current communications law authorizes the Federal Communications Commission (FCC) to reclaim spectrum licenses from a bankrupt bidder is consistent with the intent of Congress when the law was passed.

Before Congress amended the Communications Act, spectrum was awarded randomly by lottery to any person who put his card in the hat and had the good fortune to have

his card pulled out. The lottery process rewarded speculators least able to utilize the spectrum and made wealthy speculators who paid the requisite minimal fee for the right to participate in the lottery. The FCC also used a comparative hearing process which significantly delayed the award of licenses and slowed the rollout of new and innovative service to consumers.

Congress rejected both approaches, and substituted instead the competitive bidding process at issue today. As principal Members of the Senate Committee on Commerce, Science, and Transportation, which held hearings on and marked up this legislation, and later negotiated the final version of the law in conference with our House counterparts, we are uniquely situated to provide you with an understanding of Congressional intent on this issue.

Some of our colleagues who do not sit on the Commerce Committee have joined in an amicus brief that expresses the view that the Bankruptcy Code (11 U.S.C. 525) trumps the clear authority we granted to the FCC to reclaim spectrum licenses from a bankrupt bidder that has failed to make timely payments in compliance with the condition of the license. There is no legislative record that the Judiciary Committee which has jurisdiction over the bankruptcy laws ever held hearings on this issue or that it considered the relationship between the bankruptcy laws of the United States and the Communications Act when the legislation was considered. The only expression of Congressional intent with respect to the bidding process was in the hearing records, Committee reports, and conference report from the Senate and House Commerce Committees.

The plain fact of the matter is that there was no discussion of the bankruptcy laws at all when Congress enacted the competitive bidding provisions of section 309(j) of the Communications Act, because there was no perceived conflict between the two laws. See House Report 103-213 (1993), House Report 103-111 (1993), and Senate Hearing 103-53 (1993). Section 309(j) does not conflict with section



525 or any other provision of the Bankruptcy Code. Furthermore, in the absence of clear statutory language or legislative history to the contrary, the courts are charged with construing the statutes as consistent with each other.

We strongly disagree with the views expressed in the amicus brief, and write to clarify for you and the Court the intent of the Senate Committee that wrote the law. The policy objectives which informed our legislative judgment include: the rapid and efficient deployment of new services to the public; avoiding speculation, litigation, warehousing of spectrum, and unjust enrichment; permitting small businesses, women and minorities an opportunity to participate; and a return to the public of some value for the public resource being used for commercial gain.

It was never Congress' intention that the spectrum at issue be tied up in litigation for years on end while thousands of cellular calls are dropped each day for lack of available spectrum. It was never Congress' intention to permit a successful bidder to escape his legal obligation to consumers, the FCC, and the government. But that is exactly what has happened in the Nextwave cases.

Nothing in the legislative history or the Congressional debates leading up to enactment of the spectrum auction provision—section 309(j) of the Communications Act—supports the views in the amicus brief. The law itself is clear on its face that nothing in the establishment or implementation of a competitive bidding process should undermine or supercede the exclusive authority Congress bestowed on the FCC to grant—and reclaim—licenses based on the public interest. If there was no reclamation process, the conditions imposed on the licensees—including the condition to make timely payments—would be meaningless. Licensees could ignore the conditions at will if the agency had no recourse and force the issue to be resolved in a long, protracted litigation battle. We never intended such a result, and nothing in the legislative history supports that view.

In fact, Congress took some care to note that no ownership of the spectrum was granted to a successful bidder, and that nothing in the establishment or implementation of a competitive bidding process would undermine or supercede the FCC's continued ability to exercise its authority to grant and reclaim licenses in the public interest. See 47 U.S.C. 301 and 309(j)(6). Also, the Supreme Court has repeatedly found that the FCC is the agency vested with exclusive authority by Congress to grant spectrum licenses. Nothing in section 309(j) or the Bankruptcy Code changes that exclusive authority. As a result, no court can grant an applicant an authorization which the FCC has refused. Therefore, consistent with the FCC's rules, once a winning bidder receives a license, it must continue to comply with the FCC's rules or else it loses its license. The Bankruptcy court cannot relieve a licensee of this regulatory requirement. As the Second Circuit correctly noted, if a winning bidder can have the conditions of its license modified under the Bankruptcy Code, then the mechanism, the auction process, chosen by Congress to resolve mutually exclusive applications among qualified bidders would be worthless. See 200 F.3d 43 at 59. Therefore, the Second Circuit got it right.

The improper application of the bankruptcy laws urged in the amicus brief is preventing each of our policy objectives from being achieved—at least with respect to spectrum at issue in the Nextwave cases. And it would set a dangerous precedent for future auctions. In fact, some of those who bid in Auction 35—the auction held on the spectrum the FCC reclaimed from Nextwave—have considered filing bankruptcy themselves on the theory that the bankruptcy court might allow them to pay less than they bid for the spectrum.

We note that the amicus brief cites subsequent efforts by the FCC to get specific legislation enacted to provide an explicit waiver of the bankruptcy laws as evidence that their argument is correct. We once again disagree. In fact, we were among the principal sponsors of that legislative effort as senior Members of the Senate Committee on Appropria-



tions. Our pursuit of legislation in the past was rooted not in a belief that the law itself was in any way flawed or unclear, but rather in our frustration with the flawed interpretation of the law by various courts. The fact that an agency, party, or Member of Congress seeks to short circuit years of contentious litigation by clarifying—not changing—existing legislative authority is not conclusive evidence of anything other than a desire to obtain a speedier or more certain result.

Thank you for this opportunity to clarify the intent of Congress with respect to the relationship between the Bankruptcy Code and the Communications Act. We believe the Second Circuit was correct in interpreting Congress' intent, and firmly believe the government should prevail in this case.

With best wishes.

Cordially,

/s/ TED STEVENS
TED STEVENS

/s/ FRITZ HOLLINGS
FRITZ HOLLINGS